

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992 )

CS Docket No. 97-248

RM No. 9097

Petition for Rulemaking of )  
Ameritech New Media, Inc. )  
Regarding Development of Competition )  
and Diversity in Video Programming )  
Distribution and Carriage )

REPLY COMMENTS OF CABLE NEWS NETWORK, INC.

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February 23, 1998

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**REPLY COMMENTS OF CABLE NEWS NETWORK, INC.**

Cable News Network, Inc. ("CNN"), by its attorneys, submits these reply comments in the above-referenced proceeding. CNN is a vertically-integrated cable programmer subject to section 628 and the Federal Communications Commission's ("Commission") program access rules. In addition, CNN is currently a defendant in a program access complaint ("CNN Complaint") filed by four C-band programming retailers – Consumer Satellite Systems, Inc., Satellite Receivers, Ltd., Programmers Clearing House, Inc. and Turner Vision, Inc. ("Complainants"). Three of these Complainants, along with two other C-band programming retailers (collectively "C-band Commenters"), have filed initial comments in the above-referenced proceeding criticizing the Cable Services Bureau's handling of the CNN Complaint. CNN's reply comments respond to these criticisms so that the record in this Docket reflects the true facts.

As an initial matter, the present proceeding is an improper place to address the merits of the issues concerning the CNN Complaint or the decisions the Bureau made in handling it, and CNN will not do so here. If Complainants have specific concerns or criticisms about the Bureau's handling of their case, they should raise those concerns in the CNN Complaint proceeding, not in a generic rulemaking proceeding. The C-band Commenters do use the present proceeding to make two fundamental criticisms about their case – that it has been pending too long and that they did not receive enough discovery. They therefore argue for changes in the Commission's rules that would impose deadlines and grant discovery as of right. The procedural history of the CNN Complaint proceeding, however, offers no support for these proposals. The C-band Commenters, like a number of other commenters, would like the Commission to adopt strict time limits for resolving program access complaints.<sup>1/</sup> The C-band Commenters propose that a price discrimination complaint be resolved within 150 days and a "simple" program access case be decided within 90 days after the first status conference in the case is held.<sup>2/</sup> Though the C-band Commenters accurately observe that the resolution of price discrimination cases will generally require more time, the proposal of strict time limits nevertheless fails to recognize that the length of time necessary to resolve a specific program access complaint will vary depending on the facts and issues of each individual case. As the Commission correctly noted in its Notice of Proposed Rulemaking, the "request for one universally applicable time limit may not sufficiently take into account the myriad circumstances faced by the Commission in resolving program access complaints. . . . In the instance of a

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<sup>1/</sup> Joint Comments of American Programming Service, Inc. et al. at 6-7 ("Joint Comments").

<sup>2/</sup> Id. at 7.

heavily contested price discrimination proceeding, . . . full and fair resolution of such a case in the time limits advocated . . . becomes more problematic[.]”<sup>3/</sup>

The C-band Commenters have described the Complainants’ price discrimination case as “the poster child of the need for [procedural and substantive] reform” of the program access rules.<sup>4/</sup> What they fail to note is that the CNN Complaint is essentially the first of its kind involving alleged price discrimination against C-band programming retailers and cannot, and should not, be portrayed as the paradigmatic program access complaint. In fact, if anything, the CNN Complaint demonstrates the inappropriateness of trying to pigeonhole all program access complaints into a “one size fits all” procedural schedule. For example, because price discrimination cases often raise difficult facts and issues, contrary to the C-band Commenters’ criticisms,<sup>5/</sup> additional filings other than the complaint, answer, and reply, which provide supplemental information, may be helpful to further resolution of program access cases.<sup>6/</sup>

The CNN Complaint is indicative of how strict procedural deadlines and a “one size fits all” mentality are not realistic. In their 9-page complaint (with 12 pages of exhibits), Complainants alleged, based solely on the uncontested fact that CNN was charging C-band programming retailers different rates than it charged facilities-based distributors, that CNN violated section 628. CNN submitted a 79-page answer (with more than 100 pages of exhibits)

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<sup>3/</sup> Notice of Proposed Rulemaking, CS Docket No. 97-248, at 17 ¶ 39 (rel. Dec. 18, 1997).

<sup>4/</sup> Joint Comments at 4.

<sup>5/</sup> Id. at 7-8.

<sup>6/</sup> Ameritech New Media’s own proposal would require numerous additional pleadings. See Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 – Procedures for Adjudicating Program Access Complaints, RM 9097, Petition for Rulemaking of Ameritech New Media, Inc. at 16 (filed May 16, 1997). CNN does not endorse Ameritech’s proposal to require additional pleadings; instead, it supports Bureau discretion to consider additional pleadings.

delineating why in its view numerous cost, benefit, economic and business factors – such as penetration, contribution to advertising revenue stream, signal security, difference in delivery costs, channel positioning, etc. – justified the price differential.<sup>7/</sup> Indeed, section 628 of the Communications Act expressly permits vertically-integrated programmers to set their rates based not only on the additional costs of providing programming to the C-band market, but also on the difference in the value and benefits that a programmer receives from furnishing its programming to facilities-based distributors such as cable operators, SMATV, MMDS, and DBS operators.<sup>8/</sup>

Although some seem to believe that section 628 is violated whenever a rate differential exists, that is not what the statute says. Price differentials should rarely, if ever, constitute violations of section 628; they have been and remain commonplace in a market where the costs and benefits of doing business with particular distributors vary. The Commission should also reject arguments that would deprive a programmer of its statutory opportunity to take legitimate business justifications into consideration when setting its rates. Indeed, Congress, in enacting the 1992 Cable Act, noted that its policy was to continue “to rely on the marketplace, to the maximum extent possible.”<sup>9/</sup>

Yet, proposals to shorten the time to resolve cases and to impose damages would further interfere with the marketplace. Imposing artificial deadlines on the resolution of program access cases would further distort a process that already sets a low threshold for complainants. Under

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<sup>7/</sup> See Consumer Satellite Sys., Inc., et al. v. Cable News Network Inc., Docket Nos. CSR 4684, 4685, 4686, Consolidated Answer of Cable News Network (Mar. 18, 1996).

<sup>8/</sup> 47 U.S.C. § 548(c)(2)(B). Moreover, the Commission’s rules state that “nothing” in the rules “shall preclude” a programmer from taking into consideration these factors when it sets its rates. 47 C.F.R. § 76.1002(b).

<sup>9/</sup> Cable Television Consumer Protection and Competition Act of 1992, § 2(b)(2).

the current rules, the presence of a rate differential appears to establish a *prima facie* price discrimination case, placing the burden on the programmer defendant to demonstrate that its pricing decisions are justified.<sup>10/</sup> Indeed, defendants like CNN are forced to explain any price differentials in great detail, relying in part upon highly sensitive confidential business information to “prove their innocence,” by demonstrating that the challenged differential reflects legitimate cost and benefit factors expressly authorized by Congress and the Commission.

Thus, while the C-band Commenters state that they are “perplexed and greatly disappointed by the delay in the resolution of their complaint,”<sup>11/</sup> given Congress’s explicit endorsement of differential pricing, CNN (and other programmers) are entitled, at the very least, to consideration of the business justifications offered in support of any challenged price differences – an outcome that would be thwarted by the strict time constraints suggested by the C-band commenters and others.

The imposition of a damage remedy also exacerbates concerns about marketplace distortions. A damage remedy is unnecessary and would undercut the statutory scheme. The C-band Commenters and others supporting damages are simply seeking commercial leverage to accomplish indirectly what they cannot do directly – eliminate the business justifications that in the marketplace underlie legitimate pricing differences between differently-situated distributors. The Commission has no basis upon which to take this step.

As noted, the C-band Commenters have also complained that the Complainants have not received adequate discovery in their case against CNN and urge the Commission to allow

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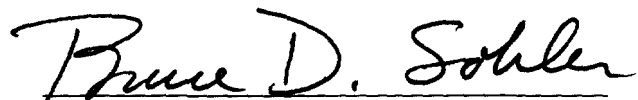
<sup>10/</sup> Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act, 8 FCC Rcd 3359, 3416 ¶ 125 (1993).

<sup>11/</sup> Joint Comments at 6.

discovery as of right.<sup>12/</sup> To the contrary, the CNN Complaint proceeding shows it is sufficient for the Bureau Staff to have the discretionary authority to supervise and manage discovery where and how it feels it is appropriate. Notwithstanding the C-band Commenters' complaint, CNN produced a nearly 50-page response (including exhibits) to the Bureau's interrogatory, which contained a detailed quantitative justification of the price differential challenged by the Complainants.<sup>13/</sup> This response included highly sensitive proprietary information. To allow, as suggested by the C-band Commenters, complainants to enjoy an unfettered discovery as of right would only serve to delay further the resolution of program access complaints and raise the costs of defending them. The Commission should reject calls for discovery as of right.

Respectfully submitted,

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<sup>12/</sup> Joint Comments at 10.

<sup>13/</sup> Consumer Satellite Sys., Inc., et al. v. Cable News Network, Inc., Docket Nos. CSR 4684, 4685, 4686, 4706, Cable News Network, Inc.'s Response to Interrogatory (May 15, 1997).

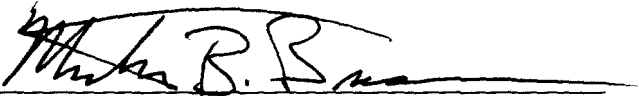
## **CERTIFICATE OF SERVICE**

I, Michael B. Bressman, hereby certify that on this 23rd day of February 1998, I caused copies of the foregoing "Reply Comments of Cable News Network, Inc." to be sent to the following by either first class mail, postage pre-paid or by hand delivery:

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